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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~284.~~ ~~64~~ 64

OSWALD BRODER, PLAINTIFF IN ERROR,

vs.

THE NATOMA WATER AND MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED OCTOBER 21, 1876.

SUPREME COURT OF THE UNITED STATES

No. 284.

OSWALD BRODER, PLAINTIFF IN ERROR,

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IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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1 UNITED STATES OF AMERICA, *ss:*

To the Natoma Water and Mining Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be held at the city of Washington, District of Columbia, on the second Monday of October, A. D. 1876, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Oswald Broder is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable W. T. Wallace, chief justice of the supreme court of the State of California, this third day of February, A. D. 1876, and of the Independence of the United States the 100th.

W. T. WALLACE,
Chief Justice.

2 Service of the within citation by copy is hereby admitted. Sacramento, May 27, 1876.

A. P. CATLIN,
Attorney for Defendant in Error.

(Indorsed:) Original 4198. United States Supreme Court. Oswald Broder, pl'ff in error, vs. The Natoma Water & Mining Company, def't in error. Citation. Filed June 10, 1876. D. B. Woolf, clerk, by H. P. Bush, deputy.

3, 4 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the justices of the supreme court of the State of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between Oswald Broder, plaintiff in error, and the Natoma Water and Mining Company, defendant in error, a manifest error hath happened, to the great damage of the said Oswald Broder, plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United State' Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said United State' Supreme court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this third day of February, in the year of

our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the 100.

The above writ of error is hereby allowed.

W. T. WALLACE,
Chief Justice.

Attest, &c.

L. S. B. SAWYER,
Clerk U. S. Circuit Court Dist. of Cal.

(Indorsed:) Original No. 4198. United States Supreme Court. Oswald Broder, pl'ff in error, vs. The Natoma Water and Mining Company, def't in error. Writ of error. Lodged & filed February 4th, 1876. D. B. Woolf, clerk, by H. P. Bush, deputy.

5,6 In the supreme court of the State of California.

OSWALD BRODER, PLAINTIFF IN ERROR,
vs.
THE NATOMA WATER & MINING COMPANY,
defendant in error.

Know all men by these presents that we, Oswald Broder as principal, and Jacob Broder and Samuel Ricker as securities, are held and firmly bound unto the Natoma Water and Mining Company, its successors and assigns, in the sum of one thousand dollars to be paid to the said company, its successors and assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents, sealed with our seals and dated this 15th day of January, 1876.

Whereas the above-named Oswald Broder hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the supreme court of the State of California: Now, therefore, the condition of this obligation is such that if the above-named Oswald Broder shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his pleas, then this obligation shall be void, otherwise to remain in full force and virtue.

7,8 OSWALD BRODER. [SEAL.]
JACOB BRODER. [SEAL.]
SAM RICKER. [SEAL.]

STATE OF CALIFORNIA,
County of Sacramento:

Jacob Broder and Samuel Ricker, being duly sworn, each for himself says that he is a resident and freeholder in said State, and is worth one thousand dollars over and above all just debts and liabilities, exclusive of property exempt from execution.

JACOB BRODER.
SAM. RICKER.

Subscribed and sworn to before me this 21st day of January, A. D. 1876.

THOMAS STEPHENSON,
Justice of the Peace, Sacramento County, California.

(Endorsed:) Oswald Broder vs. Natoma Water & Mining Co. Bond on writ of error. Approved. Wm. T. Wallace, chief justice. Filed February 4, 1876. D. B. Woolf, clerk, by H. P. Bush, deputy.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of a bond filed in my office in the above-entitled cause on the 4th day of February, 1876, as shown by the records of my office.

Witness my hand and the seal of the court this 21st day of September, A. D. 1876.

[SEAL] D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy*.

9, 10 In the supreme court of the State of California.

OSWALD BRODER
vs.
NATOMA WATER AND MINING COMPANY.

To C. G. W. French, esq., att'y for def't:

Take notice that on the 14th day of January, 1875, at the opening of said court on that day, or as soon thereafter as the matter can be reached, we will move the court for leave to file the certified transcript in said case.

Respectfully,

McKUNE & WELTY,
Atty's for Appellant.

(Indorsed:) Broder vs. Natoma W. & M. Co. Notice. Service by copy admitted 6th Jan'y, 1875. C. G. W. French, att'y for resp'd't.

11, 12 In the supreme court of the State of California.

OSWALD BRODER, PLAINTIFF & APPELLANT,
vs.
NATOMA WATER & MINING COMPANY, DEF'T & resp'd't.

To C. G. W. French, esq, att'y for def't:

Take notice that the said appellant herewith presents to you a transcript on appeal in said case, and requests your certificate that the same is correct, pursuant to rule 9 of the rules of said court.

Respectfully,

McKUNE & WELTY,
For Plaintiff & Appellant.

(Indorsed:) Broder vs. Natoma Co. Notice, &c. Service by copy admitted 29th day of December, 1874. C. G. W. French, att'y for def't.

13, 14 In the supreme court of the State of California.

OSWALD BRODER, PL'T'FF & APPELLANT,
vs.
NATOMA WATER & MINING COMPANY, DEF'T & respondent.

To McKune & Welty, attorneys for appellant:

Take notice that the transcript presented for certification in the above cause on the 29' day of December, 1874, is by me deemed incorrect, as follows:

I. In the record of this cause there is a demurrer. This demurrer and the action of the court thereon is omitted from the transcript presented by you for certification.

II. The map marked Ex. X inserted between the 57th & 58th folios is entirely incorrect as to the location of the main ditch and branch ditch and the location of def't's & def't's grantor's dwelling-house. For the above incorrectness and others too numerous to specify the undersigned declines to certify the correctness of said transcript.

Respectfully yours,

C. G. W. FRENCH,
Att'y for Def't & Resp'd't.

(Indorsed:) Broder vs. Notoma Co. Copy of specifications.

15 In the supreme court of the State of California.

In the district court of the sixth judicial district of the State of California in and for Sacramento County.

OSWALD BRODER, PLAINTIFF,
vs.
NATOMA WATER AND MINING COMPANY, DEFENDANT. } No. 4198.

Complaint.

The plaintiff above named complains of the defendant above named and alleges:

I. That the above-named defendant is a corporation created and existing under the laws of this State, and was such corporation prior to and during all the time and dates hereinafter alleged.

II. That plaintiff is the owner and in the possession of the southeast quarter of section twenty-nine, the south half of the southwest quarter of section twenty-eight, the northwest quarter and north half of the southwest quarter of section thirty-three, and the northeast
16 quarter of section thirty-two, all in township number ten north, range eight east, Monte Diablo base and meridian, according to the survey of the United States Government, and has been so the owner and in possession of all except the said south half of southwest quarter of section twenty-eight, and the north half of northwest quarter of section thirty-three, for more than three years last past.

III. That on or about the 1st day of November, A. D. 1868, the defendant wrongfully and unlawfully entered into and upon said land and constructed a ditch across it, with its embankments, excavations, windings, and branches, a distances of four hundred and eighty rods in length, and an average width of twelve feet. That the windings of said ditch and branches render it difficult to plow or cultivate said land for a much greater width, rendering so much of said land useless. That said ditch so meanders along and across said land as to render it difficult and impracticable to plow along the line of said ditch for a width of six rods.

IV. That said land is or constitutes one tract or parcel, and said ditch extends entirely across said land, and renders it necessary for plaintiff, at great cost and expense to himself, to maintain
17 bridges across the same.

V. That the defendant for the last three years has kept and

maintained continuously running water in said ditch, and during the summer season for each of the three years past the health of plaintiff and his family has been injured; and if the said ditch shall continue the same will be in the future a continued source of ill-health to the plaintiff and his family.

VI. That the plaintiff is the assignee of the said south half of southwest quarter of section twenty-eight, and the north half of northwest quarter of section thirty-three, and the damages done to Jacob Broder, his assignor of said land, and is entitled to recover the same of defendant.

VII. That defendant, by the means aforesaid, has obstructed the free use of the property of plaintiff and that of his assignor, Jacob Broder, and continues to obstruct the free use of said land of plaintiff, and interferes with the comfortable enjoyment of the same, and that such act is a nuisance.

VIII. That by reason of the premises plaintiff has sustained,
18 and is entitled to recover of defendant, damages in the sum of twelve thousand dollars.

Plaintiff prays:

I. That said ditch be adjudged a nuisance.

II. That at the cost and expense of the defendant the same be filled up and abated.

III. That the plaintiff have and recover of the defendant the sum of twelve thousand dollars with interest and costs.

IV. That plaintiff have all needful and proper relief, and such other further or different relief as to the court may seem just and proper.

McKUNE & WELTY,
Attorneys for Plaintiff.

STATE OF CALIFORNIA,
County of Sacramento, ss:

Oswald Broder, after being duly sworn, on his oath says he is the plaintiff in the foregoing complaint; that he has heard the same
19 read, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters and things which are therein stated on his information or belief, and as to those matters he believes the same to be true.

OSWALD BRODER.

Subscribed and sworn to before me this 17th day of October, A. D. 1871.

[SEAL.] MATT. F. JOHNSON,
Notary Public, California.

Filed October 19th, 1871.

L. UPSON, *Clerk*,
By J. H. PARNELL, *Deputy Clerk*.

In the supreme court of the State of California.

In the district court of the sixth judicial district of the State of California in and for Sacramento County.

OSWALD BRODER, PLAINTIFF,
vs.
NATOMA WATER & MINING CO., DEFENDANT. } No. 4198.

20 And now comes the defendant, appearing and defending in said

court, by C. G. W. French, its attorney, and demurs to the complaint of plaintiff filed herein on the following grounds:

First. That the court has no jurisdiction of the person of defendant, or the subject of the action.

Second. That there is a defect of parties plaintiff, in this, that Jacob Broder is not made a party.

Third. That several causes of action have been improperly united, in this, that injuries to person and injuries to property are united; and that the two separate tracts claimed by plaintiff, as the assignee of Jacob Broder, are separate causes, and if they could be united are not separately stated.

Fourth. That the complaint does not state facts sufficient to constitute a cause of action.

Fifth. That the complaint is ambiguous, unintelligible, and uncertain, in this, that it does not appear when, if ever, or how long Jacob Broder was the owner or possessor of the two tracts of land claimed by plaintiff as the assignee of said Jacob Broder, or that plaintiff or said Jacob Broder ever had any interest in said two tracts of land, and residence or locality of parties to the action, or location of said lands is shown by said complaint, and the damages claimed are not charged as resulting from defendant's acts.

21 Wherefore defendant asks judgment for its costs.

C. G. W. FRENCH,
Attorney for Defendant.

Service by copy admitted January 6, 1875.

C. G. W. FRENCH,
Att'y for Def't & Exc'pt.

Title of court and cause.

NOVEMBER 17TH, 1871.

Now on this day, this cause coming on to be heard on defendant's demurrer to plaintiff's complaint, it is ordered by the court that the said demurrer be and the same is hereby overruled; and it is further ordered by the court that the defendant have until December 4th, 1871, to file his answer herein; to which ruling of the court upon said demurrer the counsel for defendant duly excepts, and asks to have its exceptions duly entered herein, which is by the court granted, and said exception hereby duly entered.

Answer.

Title of court and cause.

And now comes the said defendant, the Natoma Water and Mining Company, and for answer to the complaint in this action, denies that the
22 plaintiff is or ever was the owner of or in the possession of the ditch or branches or banks of said ditch described in said complaint, or of the lands covered by said ditch or branches or banks, or of so much of the lands on either side of the same as are necessary for the proper use, working, operation, and control of said ditch and said branches, or that Jacob Broder ever owned or ever was in possession of said ditch, branches, and lands aforementioned.

Defendant denies that it wrongfully or unlawfully constructed or excavated said ditch or its branches, and denies that it is difficult or im-

practicable to plow along the line of said ditch or branches for a width of six rods or any other width, and denies that it is necessary for plaintiff to maintain bridges across said ditch, and denies that it excavated said ditch at the time alleged in the complaint.

Defendant denies that by means of said ditch or of the water running therein the health of plaintiff or his family is or has been injured, and denies that the same will be in the future a source of ill health to the plaintiff or his family, and denies that Jacob Broder ever sustained any damage, injury, or wrong whatever, by reason of said ditch or branches or the water running therein, and denies that plaintiff is the assignee of the same.

Defendant denies that it has obstructed the free use of plaintiff's property or that of Jacob Broder, or that it has interfered with
23 the comfortable or any enjoyment of the same, or will hereafter do so.

Defendant denies that plaintiff has sustained damages in the sum of twelve thousand dollars, or in any sum whatever.

Defendant further answering, and for a separate defense, avers that more than eighteen years before the commencement of this action, and while the lands described in the complaint were public lands of the United States, defendant, under license of the said United States, entered upon said lands and excavated said ditch and branches, and took possession of the same and the land under and on each side of the same necessary for the operation, repair, and management of said ditch and branches, and has ever since continuously held and maintained exclusive possession and ownership of said ditch, branches, and lands, adversely to said plaintiff and Jacob Broder, and all other persons and parties, and claiming the same as the owner thereof during all the time aforesaid.

That said ditch and branches are a part of the Natoma Water and Mining Company's ditch, which was constructed, as aforesaid, about the year 1853, by defendant, for the purpose of supplying water to miners for mining, and to others for various other purposes. That the same extends from its dam on the south fork of the American River, a short distance above Salmon Falls, in the county of El Dorado, southwesterly along and over gold-bearing lands, to Farmers Diggings and
24 other places and localities in the county of Sacramento, a distance of about seventy miles.

That ever since its construction it has been continuously used for the purposes aforesaid in conveying the water from said river, which defendant has sold for the uses and purposes aforesaid, and has realized large gains, returns, and profits therefrom.

Defendant further answering, and for a separate defense, avers that while said lands described in the complaint were still public lands of the United States, defendant received from the Government of the United States a license to enter upon the same and construct said ditch and branches, and to use and occupy the same and so much of the lands under and on each side of the same as is necessary for the proper use, operation, and management of the same, and that said license has never been revoked or annulled, but has since been expressly acknowledged and affirmed by the public act of said government, approved July 26th, 1866.

Defendant further answering, and for a separate defense, avers that while all of said lands were the public lands of the United States, the Government of the United States granted to defendant the perpetual right of way for said ditch and branches and their banks, and sufficient

land on either side of its banks for the convenient use, operation, occupation, and control of the same, and the perpetual right
25 to use, possess, and enjoy said ditch and branches for conveying water therein, and said banks and land on either side thereof, and that said grant was made by an act of Congress, which is a public act.

Defendant further answering, and for a separate defense, avers that at the time of the commencement of this action, more than five years have elapsed since the plaintiff's cause of action have accrued.

Defendant further answering, and for a separate defense, avers that neither the plaintiff, his ancestors, predecessors, or grantor had been possessed or seized of the said ditch, branches, banks, or the lands on either side thereof for a width sufficient for the use of the same within five years before the commencement of this action.

Defendant further answering, and for a separate defense, avers that for more than five years before the commencement of this action the defendant had been in the continued, uninterrupted, and peaceable and adverse possession of said ditch and its banks and branches, and the land on either side thereof and under the same, necessary for the use and operation of said ditch and branches, claiming to own the same; and both the plaintiff and said Jacob Broder had full knowledge of defendant's possession and claims of ownership of the same, and during all that time and during all the time since the building of the same
26 fully acquiesced in defendant's said ownership and possession.

Defendant further answering, and for a separate defense, avers that about the year 1852 defendant made the surveys and located the lines of said ditch and branches, and that plaintiff long afterwards located his dwelling and took up a small tract of land near the lines of said ditch, as defendant is informed and believes and charges the fact to be, on account of prospective advantages and benefits that would accrue to said lands by means of said ditch and branches in watering and making fruitful the same, and long after the said ditch and branches had been constructed and in use said Jacob Broder located near the same for the avowed purpose of securing such advantages and benefits from said ditch and branches, and both plaintiff and said Jacob Broder placed their residences in the vicinity of said ditch and branches voluntarily and well knowing that water flowed in the same during the summer or warm season, and that water could not be obtained to work the gold mines in that vicinity unless the same was conveyed through said ditch and branches, and that defendant intended to continue to flow water through the same, and plaintiff and said Jacob Broder have always acknowledged defendant's right so to do from the time of
27 the construction of said ditch and branches up to the time of the commencement of this action.

Defendant avers that at the time of the entry of defendant and at the time of the entry of plaintiff and Jacob Broder upon the lands described in the complaint, that defendant is informed and believes, and so charges the fact to be, that said lands were public mineral lands, containing gold-bearing earth and mines of gold, and that a large portion if not all still are such mineral lands.

And defendant further answering avers that during all the time since the construction of its said ditch and branches in 1853, it has held continuous possession of the same and the banks thereof and the lands on either side thereof necessary for the use, operation, and management of the same, and during all the time since 1853 and before have continuously furnished to a vast number of mines, farms, orchards, vineyards,

gardens, ranches, dwellings, and persons a full supply of water for their respective uses. That defendant's said ditch and branches are of great cost and value and a great public use and benefit.

That during all the time since the construction and use up to the time of the commencement of this action, plaintiff and said Jacob Broder have always acknowledged defendant's ownership and possession
28 of the same and the lands necessary for the operation of the same and all the rights of defendant therein. That if the prayer of plaintiff's complaint be granted a vast extent of country will be deprived of water in all its beneficial uses as heretofore had, and the ditch, branches, and works of the defendant will be rendered worthless and destroyed.

Wherefore defendant, having fully answered, prays that this action be dismissed and that defendant be allowed to go hence and have judgment against plaintiff for its costs in this behalf most wrongfully sustained

C. G. W. FRENCH,
Attorney for Defendant.

STATE OF CALIFORNIA,
County of Sacramento, ss:

H. T. Knight, being first duly sworn, says and deposes that he is the superintendent and managing agent of the corporation defendant in the foregoing answer named, and that he is the only officer of said corporation in said county of Sacramento, or residing in said county; that the facts in said answer set forth are more within his knowledge than of any other officer of said corporation; that he has heard read the said foregoing answer and knows the contents thereof, and that the same
29 is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to these matters that he believes it to be true.

H. T. KNIGHT.

Subscribed and sworn to before me this 28th day of December, 1871.
[SEAL.] MATT. F. JOHNSON,
Notary Public.

Filed in office January 2d, 1872.

L. UPSON, *Clerk.*
By J. H. PARNELL,
Deputy Clerk

Findings of facts.

(Title of court and cause.)

In this case the court finds the following facts:

I. That Oswald Broder derived his title to the land described in his complaint as follows:

First. A patent from the United States Government to plaintiff, dated November 1st, 1867, for the northeast quarter of section thirty-two.

Second. A patent from the United States Government to Jacob Broder, dated December 1st, 1868, for the south half of the southwest quarter of section twenty-eight.

Third. A deed from the Central Pacific Railroad Company of California to plaintiff, dated October 8th, 1867, for the south half of the

30 northwest quarter, and the north half of the southwest quarter of section number thirty-three.

Fourth. A deed from the Central Pacific Railroad Company of California to Jacob Broder, dated January 22, 1868, for the northwest quarter of the southeast quarter, the west half of the northeast quarter, and the north half of the northwest quarter of section number thirty-three, all in township number ten north, range number eight east, Monte Diablo base and meridian.

Fifth. A deed from Jacob Broder to plaintiff, dated October 17th, 1871, conveying to him such parts of the land so conveyed to Jacob Broder as are described in the complaint.

II. That the United States Government, by its patent, dated June 27th, 1867, granted to the Central Pacific Railroad Company of California the lands so conveyed by its deeds to Jacob Broder and Oswald Broder, mentioned in subdivisions three and four of finding one.

III. That the said patent mentioned in finding two was duly issued to and in accordance with two several acts of Congress of the United States, one passed July 1st, 1862, entitled an act to aid in the construction of a railroad and telegraph line from the Missouri River to

31 the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes; the other, amendatory thereof, passed July 2d, 1864.

IV. That the said land, so granted by the Government of the United States to the Central Pacific Railroad Company of California, and by it conveyed to Jacob Broder and plaintiff, was situate within the limits of the land set apart and held in reserve to satisfy said grant of land mentioned in said several acts.

V. That, in the month of December, 1865, the said Central Pacific Railroad Company of California completed forty consecutive miles of its road, commencing at the city of Sacramento, extending eastwardly, as shown by a copy of a plat hereto annexed, marked B, and made a part hereof, which plat also shows the land described in the complaint.

VI. That the said several acts of Congress are public acts, to be referred to on the trial of this case, and on appeal as such, without being set out in the papers.

VII. That at the date of the commencement of this action the plaintiff was in the possession of all the land described in his com-

32 plaint, except a certain vineyard which was in the possession of Jacob Broder, being all the land deeded by Jacob Broder to plaintiff on the east side of the ditch, as shown in the diagram contained in these findings.

VIII. That defendant is, and for fifteen years last past has been, a corporation under the laws of the State of California.

IX. That, in the early part of the year 1851, the line of canal mentioned in the pleadings was surveyed and located for about ten miles at its upper end and in 1852 a continuation thereof was located through the lands described in the complaint.

That during the fore part of the year 1853 the extension of such canal was in progress through said land, and such canal was completed on the 25th day of June, 1853, by defendant.

X. That for more than eighteen years next before the commencement of this action the defendant was in the continued, uninterrupted, absolute, peaceable, and exclusive possession of the land described in

33 the complaint, as passed over and occupied by said canal and branch, defendant claiming title thereto adverse to plaintiff and all other persons, except the United States, and adverse to the United

States since the day of , 1855, and during all that time defendant was running water through said canal and branches, and exercising dominion and control over the whole thereof.

XI. That the defendant's right to the use of said canal and branches for the purposes aforesaid, during all that time aforesaid, has been uniformly acknowledged and recognized by the local customs, laws, and decisions of courts of this State, and ever since the location and construction of said canal and branches have been claimed by defendant as its property, and so continuously held and used, and the right to the use of said waters and canal for conveying said water was acquired and used continuously for so conveying them for the purposes aforementioned, and that the land over which said canal and branches are located and covered by them is necessary and indispensable for the uses of said canal, which would be almost valueless without the use of said land.

XII. That the legal title to said lands remained in the United States until the date of the several patents hereinbefore mentioned, un-
34 less the act of Congress of July 26th, 1866, gave the defendant some right, or unless the defendant acquired some right under the local customs of California, or the decisions of its courts.

XIII. That said canal was constructed on said land in accordance (with) customs obtaining in the mining regions of California, for the purpose of conveying water for mining, agricultural, and mechanical purposes from the south fork of the American River, at the dam of defendant, about one and one-half miles above Salmon Falls, in the county of El Dorado, through mineral lands in some places and agricultural lands in others, to Farmers' Diggings, a gold-mining camp in the county of Sacramento, and other localities, being about twenty-five miles in length, with several branches, one of which is in part on the land of plaintiff.

XIV. That said canal was constructed at a cost of about two hundred thousand dollars.

XV. That for more than fifteen years next before the commencement of this suit the defendant was in the continued, uninterrupted, absolute, peaceable, and exclusive possession of the ditch extending through the lands of plaintiff, claiming to hold the same as an easement adverse to plaintiff and all other persons except the United States, and as
35 adverse to the United States since the 1st day of July, 1855, and during all that time defendant was running water through said land, and exercising dominion and control over the whole thereof.

XVI. That said canal is wide enough to carry fourteen thousand inches of water through the land of plaintiff. That each year the defendant cleans out said ditch and enlarges the bank by the amount of matter thrown out in cleaning the ditch, but the ditch proper has not been enlarged, and the amount of earth thrown out annually is from six to eight wagon loads per mile.

XVII. That the ditch of defendant with the branch thereof lies through the farm of plaintiff, as shown in the diagram which follows this finding, marked X; the big ditch extends on the farm of plaintiff from "a" to "f," crossing the several lines as shown in the diagram; the branch or little ditch extends from "e," where it intersects the big ditch, to "H," intersecting the several lines as shown in the diagram. The ‡ marked thereon is the house of plaintiff. Jacob Broder's house is near the west line on the northwest quarter of section thirty-three, marked Jacob Broder.

36 XVIII. That the ditch of defendant obstructs and interrupts the free use of the farm of plaintiff, the same being too deep and the

banks too steep to be crossed by teams, and rendering it necessary to maintain bridges across the same, and rendering it difficult to plow in the immediate vicinity of the ditch.

XIX. That the plaintiff and Jacob Broder settled upon and occupied the land severally patented and sold to them by the United States Government in the year 1852, and before the ditch of defendant was constructed through said land, and they severally occupied the land which was so bought by them from thence till the deed from Jacob Broder to Oswald Broder was executed.

XX. That the lands mentioned in the complaint in this action which are not occupied by the ditch and banks are augmented or increased in value by means of the location and operation of said [ditch] and branch thereon, and that no request or demand to discontinue or to cease or change the operation of said canal on said premises was ever made by any person or party before the commencement of this action.

XXI. That on the 26th day of July, 1866, the United States Government, by act of Congress, on that day approved, acknowledged
37 and confirmed defendant's rights in the premises described in the complaint. That on the 14th day of September, 1866, said Jacob Broder, plaintiff's grantor, filed his declaratory statement in the United States land office, and claiming settlement on the 10th of September, 1866, to the south half of southeast quarter and south half of southwest quarter of section twenty-eight, township ten north, range eight east, Mount Diablo base and meridian; and on the 12th day of February, 1867, made proof upon the same.

That on the 6th day of August, 1866, Oswald Broder filed his declaratory statement, alleging settlement on the 18th day of August, 1865, to the northeast quarter of section thirty-two, township ten north, range eight east, same meridian, and on the 20th day of November, 1866, made his proofs to the same. That on the 27th day of June, 1867, the Government of the United States issued its patent to the Central Pacific Railroad Company of the odd sections in township ten north, range eight east, Mount Diablo base and meridian, subject to the conditions, limitations, exceptions, and reservations in said patent, and in the act of Congress authorizing the same contained and named.

XXII. That Jacob Broder and Oswald Broder, from the time they went u on the lands adjacent to plaintiff's canal, have purchased water of defendant, which they used in irrigating said lands, and have
38 at different times worked upon said canal and branch in repairing for defendant, and have used the same to the present time.

XXIII. That Jacob Broder, in the year 1865, settled upon the northwest quarter of section thirty-three, in said township ten, and has continued to live on said section from that time to this.

XXIV. That the lands described in the complaint are dry and arid in summer, and that there is no natural water on the same. That Oswald Broder settled on the lands described in his patent from the United States in October, 1852, and has resided there ever since, and ever since the construction of said ditch has used the water from the same to irrigate the lands described in the complaint, except that Jacob Broder did not so use the water in the summer of 1873.

XXV. That it is not difficult or impossible to cultivate and plow near the said ditch, except about ten feet on the east bank and fifteen feet in width in all.

XXVI. The plaintiff at the trial waived his claim for damages.

XXVII. That Jacob Broder executed his said deed to his brother for the purpose of enabling his said brother, the plaintiff, to bring

39 this action in relation to all the land in dispute, and thus avoid the necessity of two suits.

XXVIII. That said ditch and water flowing thence have not produced malaria or injured the health of plaintiff or any other person.

XXIX. That said deeds from the railroad company were executed in due form by the president and secretary of said company, and the only express authority shown by the evidence of the board of directors authorizing the making of such deeds was a resolution of the board of directors of said railroad company entered on its minutes of the proceedings of the 19th day of July, 1871, as follows:

"Resolved, That the president and secretary of the company be, and they are hereby, authorized to sign their names and affix the corporate seal of this company to any and all deeds for the conveyance of any lands of the company as the act and deed of the company, and to deliver said deed as and for a full conveyance and transfer of the title of this company as fully and as completely as said conveyance could be made in any manner known to the law.

40 "Resolved, That all conveyances of land (not including the right of way of said company) heretofore made, executed, or delivered by said president and secretary, or president pro tem., or vice-president, and sealed and delivered as the act and deed of this company, be, and the same is hereby, ratified and confirmed as the act and deed of this company."

XXX. That the defendant has not done any injury to said land through malice.

XXXI. That the principal market for the sale of water of said ditch is below plaintiff's land, and about two thousand persons are supplied with water for mining and agricultural purposes below said land of plaintiff's; and, if the ditch is abated, as prayed for, owing to the hilly character of the country, no new water could be obtained by which water through the ditch can be carried so as to supply them.

XXXII. That in the month of January of the year 1852 the line of defendant's canal was located, and during the year 1852 was be-

41 ing constructed, and that said canal was completed through the lands mentioned in the complaint in this action on the 25th day of June, 1853, and has ever since continuously used and possessed by defendant and for running water therein, and that the lands over and through which said canal was constructed was public land of the United States Government entirely vacant and unenclosed.

CONCLUSIONS OF LAW.

From the foregoing facts and indorsements in the pleadings in this cause I conclude the law to be:

First. That at the time of the commencement of this action the plaintiff was the owner of the real estate described in his said complaint, subject to the right of way of the said defendant for its said ditch.

Second. That by virtue of an act of Congress of the 26th day of July, 1866, entitled an act granting the right of way to ditch and canal owners over the public lands, and for other purposes, the defendant's claim to the right of way for its said ditch was acknowledged and confirmed over the south half of the southwest quarter of section twenty-eight, and the northeast quarter of section thirty-two, township ten north, range eight east.

42 Third. And that by virtue of said act the said defendant's claim to the right of way over the southeast quarter of section twenty-nine, the northwest quarter and the north half of the southwest quarter of section thirty-three, in same township and range, was confirmed to the legal right thereof for its said ditch.

Fourth. That any equity that the plaintiff had to remove the said ditch from the land described in the foregoing third conclusion of law was barred by the lapse of time prior to the time of commencement of this suit.

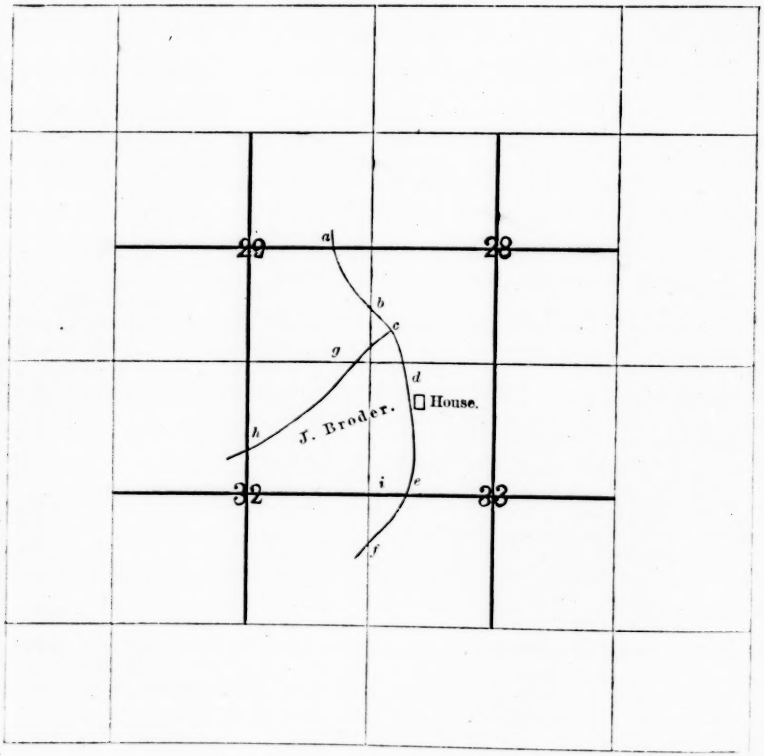
I therefore conclude that judgment should be rendered in favor of said defendant, and against said plaintiff, with costs, and it is so ordered.

LEWIS RAMAGE,
District Judge.

(Indorsed:) Filed December 12th, 1873. L. Upson, clerk, by Guy W. Cole, deputy clerk.

43 EXHIBIT X.

T. 10 N., R. 8 E.



44 STATE OF CALIFORNIA,
County of Sacramento:

I, Ham. C. Harrison, county clerk of said county and ex officio clerk of the district court in and for said county, hereby certify that the map on the reverse of this is a correct copy of the diagram marked X, referred to in finding XVII, and made a part of the findings of fact filed in the case of Oswald Broder against Natoma Water and Mining Company in said court.

I also certify that only one judgment has been entered in said case, and that was entered on the 12th day of December, 1873.

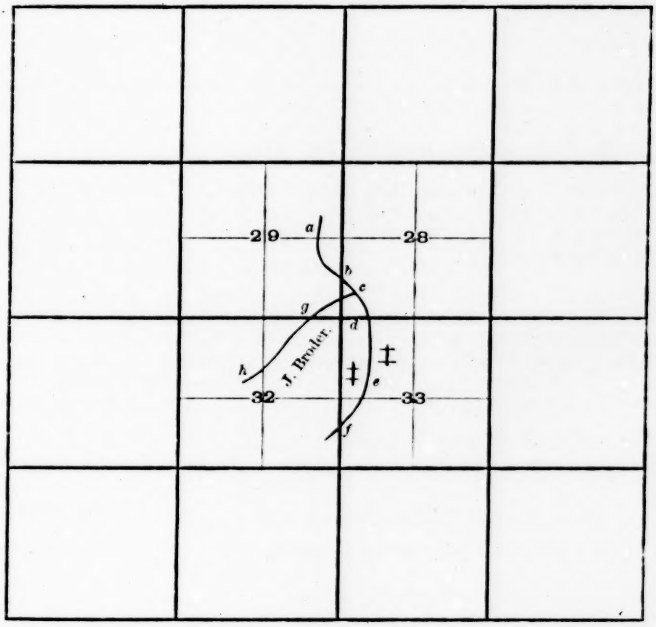
Witness my hand and the seal of said court this 5th day of January, A. D. 1875.

[SEAL.]

HAM. C. HARRISON, *Clerk*,
By GUY W. COLE, *Deputy Clerk*.

45, 46 EXHIBIT X.

Township 10 N., R. 8 E.



Judgment.

(Title of court and cause.)

December term, A. D. 1873.

47 DECEMBER 12TH, 1873.

This cause having been heretofore duly tried by the court, the

parties waiving a trial by jury, and now on this day the same was submitted to the court, and all and singular the law and the premises being by the court here seen, heard, understood, and fully considered, said court files herein its findings of fact and conclusions of law, and thereupon the court renders its decision herein in favor of the defendant and against the said plaintiff for its costs of suit herein, and orders judg. judgment to be entered accordingly.

Wherefore it is now here considered, ordered, and adjudged by the court that the plaintiff herein take nothing by his suit herein against the said defendant, and that said defendant go hence discharged of said action without day, and have and recover of and from the plaintiff, Oswald Broder, its costs of suit herein expended, and taxed at two hundred and fifty-nine dollars and ninety-five cents, and also all accruing costs.

Attest: A true copy.
[SEAL.]

L. UPSEN, *Clerk*,
By GUY W. COLE,
Deputy Clerk.

48 (Indorsed:) Filed December 12th, 1873. L. Upsen, clerk, by Guy W. Cole, deputy clerk.

Notice of appeal.

(Title of court and cause.)

To C. G. W. French, esq., attorney for defendant:

Take notice that the plaintiff in said case hereby appeals from and against the judgment entered in said case against him on the 13th day of December, 1873, to the supreme court of said State.

Respectfully,

R. C. CLARK AND
McKUNE & WELTY,
Attorneys for Plaintiff.

Due service of the above notice by copy admitted February 5th, 1874.

C. G. W. FRENCH,
Attorney for Defendant.

Filed in office February 5th, 1874.

L. UPSEN, *Clerk.*
By J. H. PARNELL,
Deputy Clerk.

49 *Stipulation.*

That a good and sufficient undertaking on appeal in said case has been duly filed, and the same is omitted in the print by agreement.

C. G. W. FRENCH,
Attorney for Respondent.
R. C. CLARK AND
McKUNE & WELTY,
Attorneys for Appellant.

We hereby certify that the foregoing transcript is correct. January 6, 1875.

McKUNE & WELTY,
Att'ys for Appellant.
C. G. W. FRENCH,
Att'y for Def't & Resp'd't.

50 (Endorsed:) No. 4198. In the supreme court of the State of California. Oswald Broder, plaintiff, vs. Natoma W. and M. Co., defendant. Transcript and appellant's points and authorities. R. C. Clark and McKune & Welty, att'ys for pl'ff. C. G. W. French, att'y for def't. Filed by order of court January 14th, 1875. Grant I. Taggart, clerk.

51 In the supreme court of the State of California. October term, A. D. 1876.

On appeal from the district court of the 6th judicial district, in and for the county of Sacramento.

OSWALD BRODER, APPELLANT,
vs.
NATOMA WATER & MINING CO., RESPONDENT. } No. 4198.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by the court.

Whereupon it is now considered, ordered, adjudged and decreed by the court here, that the judgment of the district court of the 6th judicial district, in and for the county of Sacramento, in the above entitled cause, be and the same is hereby affirmed with costs.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause, on the 18th day of October, A. D. 1875, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 21st day of September, A. D. 1876.

[SEAL]

D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy*.

52 In the supreme court of the State of California.

OSWALD BRODER
vs.
NATOMA WATER & MINING COMPANY. } No. 4198.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the annexed and foregoing are and constitute a true copy and transcript of the record and all the papers in the above-entitled cause, as the same appears upon the records and files of said court in my office.

And I do further certify that the judgment of this court was rendered on the 18th day of October, 1875 (a copy of which is herewith transmit-

parties waiving a trial by jury, and now on this day the same was submitted to the court, and all and singular the law and the premises being by the court here seen, heard, understood, and fully considered, said court files herein its findings of fact and conclusions of law, and thereupon the court renders its decision herein in favor of the defendant and against the said plaintiff for its costs of suit herein, and orders judg-judgment to be entered accordingly.

Wheretore it is now here considered, ordered, and adjudged by the court that the plaintiff herein take nothing by his suit herein against the said defendant, and that said defendant go hence discharged of said action without day, and have and recover of and from the plaintiff, Oswald Broder, its costs of suit herein expended, and taxed at two hundred and fifty-nine dollars and ninety-five cents, and also all accruing costs.

Attest: A true copy.
[SEAL.]

L. UPSEN, *Clerk*,
By GUY W. COLE,
Deputy Clerk.

48 (Indorsed:) Filed December 12th, 1873. L. Upsen, clerk, by Guy W. Cole, deputy clerk.

Notice of appeal.

(Title of court and cause.)

To C. G. W. French, esq., attorney for defendant:

Take notice that the plaintiff in said case hereby appeals from and against the judgment entered in said case against him on the 13th day of December, 1873, to the supreme court of said State.

Respectfully,

R. C. CLARK AND
McKUNE & WELTY,
Attorneys for Plaintiff.

Due service of the above notice by copy admitted February 5th, 1874.

C. G. W. FRENCH,
Attorney for Defendant.

Filed in office February 5th, 1874.

L. UPSEN, *Clerk.*
By J. H. PARNELL,
Deputy Clerk.

49 *Stipulation.*

That a good and sufficient undertaking on appeal in said case has been duly filed, and the same is omitted in the print by agreement.

C. G. W. FRENCH,
Attorney for Respondent.
R. C. CLARK AND
McKUNE & WELTY,
Attorneys for Appellant.

We hereby certify that the foregoing transcript is correct.
January 6, 1875.

McKUNE & WELTY,
Att'ys for Appellant.
C. G. W. FRENCH,
Att'y for Def't & Resp'd't.

50 (Endorsed:) No. 4198. In the supreme court of the State of California. Oswald Broder, plaintiff, vs. Natoma W. and M. Co., defendant. Transcript and appellant's points and authorities. R. C. Clark and McKune & Welty, att'ys for pl'ff. C. G. W. French, att'y for def't. Filed by order of court January 14th, 1875. Grant I. Taggart, clerk.

51 In the supreme court of the State of California. October term, A. D. 1876.

On appeal from the district court of the 6th judicial district, in and for the county of Sacramento.

OSWALD BRODER, APPELLANT,
vs.
NATOMA WATER & MINING CO., RESPONDENT. } No. 4198.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by the court.

Whereupon it is now considered, ordered, adjudged and decreed by the court here, that the judgment of the district court of the 6th judicial district, in and for the county of Sacramento, in the above entitled cause, be and the same is hereby affirmed with costs.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause, on the 18th day of October, A. D. 1875, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 21st day of September, A. D. 1876.

[SEAL]

D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy*.

52 In the supreme court of the State of California.

OSWALD BRODER
vs.
NATOMA WATER & MINING COMPANY. } No. 4198.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the annexed and foregoing are and constitute a true copy and transcript of the record and all the papers in the above-entitled cause, as the same appears upon the records and files of said court in my office.

And I do further certify that the judgment of this court was rendered on the 18th day of October, 1875 (a copy of which is herewith transmit-

ted); that on the 1st day of November, 1875, the plaintiff in error filed a petition for a rehearing of said cause, and that an order was duly entered granting a stay of proceedings until the same be determined, and that on the 27th day of November, 1875, an order was entered denying a rehearing in said cause.

And I do further certify that on the 4th day of February, 1876, said plaintiff in error filed in this court a writ of error (herewith transmitted) duly allowed by the Hon. Wm. T. Wallace, chief justice of this court, removing said cause to the Supreme Court of the United States, and lodged in my office a copy of said writ of error for the defendant in error, and also on said 4th day of February, 1876, filed in my office a bond (a copy of which is herewith transmitted), in the sum of one thousand dol-
53 lars, with sureties approved by the chief justice of this court, conditioned that said plaintiff in error shall prosecute his said writ to effect, and in case he fail to make his plea good to answer all costs.

That on the 10th day of June, 1876, said plaintiff in error filed a citation (herewith transmitted), purporting to have been served on the attorney for the said defendant in error.

Witness my hand and the seal of said court this 22d day of September, A. D. 1876.

[SEAL.] D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy*.

(Indorsement on cover:) No. 284. Oswald Broder, plaintiff in error, vs. The Natoma Water and Mining Company. California sup. ct. Filed 21st October, 1876.

No......

In the Supreme Court of the United States.

OSWALD BRODER,

PLAINTIFF IN ERROR,

v.

THE NATOMA WATER AND MINING COMPANY,

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN H. McKUNE,
Attorney for Plaintiff in Error.

Filed..... *1879.*

..... *Clerk.*

H. A. WEAVER'S Law Printing Office, No. 91 J Street between Third and Fourth, Sacramento.

IN THE SUPREME COURT OF THE UNITED STATES.

OSWALD BRODER, PLAINTIFF IN ERROR,

vs.

THE NATOMA WATER AND MINING CO., DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

ACTION TO ABATE A NUISANCE UNDER THE CALIFORNIA CIVIL CODE, SECTION 3,479; CODE CIVIL PROCEDURE, SECTION 731, *et seq.* DE COSTA vs. MOSS, 17 CAL. 613.

The defendant maintains and insists on maintaining its ditch through the lands of plaintiff.

Plaintiff derives his title to a part of the land through which the ditch extends by deeds from the Central Pacific Railroad Company of California, date October 18th, 1867, (finding 3, folio 29), and from same grantor date January 22d, 1868. (Finding 4, folio 30).

The patent to the Central Pacific Railroad Company was issued to it June 27th, 1867, under the provisions of the Acts of Congress of July 1st, 1862, (12 U. S. Statute at large, page 492), and of July 2d, 1864, (13 U. S. Statute at large, page 358).

The right of the Central Pacific Railroad Company of California, grantor of plaintiff, attached to the land at the date of its grant as an inchoate right, and its equitable interest became complete in the month of December, 1865, when the forty consecutive miles of its road was completed east from the city of Sacramento. (Finding 5, folio 31). See map referred to in finding five, for location of road and land. Nothing was required of the grantor of plaintiff after its road was so far completed, except to receive its patent for the land.

Under these circumstances, plaintiff insits that Section 9 of the Act of Congress, passed July 26th, 1866, (14 U. S. Statutes at large, page 253), relied on by defendant in so far as it interferes with the right to the absolute ownership of said land, is unconstitutional. If Congress could grant an easement over the land where such an interest was vested it could grant the fee, and thus divest the Railroad Company or its grantee of a vested right.

When did such an interest in the land vest in grantor of plaintiff?

The Railroad Company in December, 1865, had an immediate fixed right to the fee simple of the land, which right could not be impaired by an Act of Congress, without divesting the Railroad Company or its grantee of that equitable title.

When the patent did issue it too took effect by relation, as of the date of July 1st, 1862, or at least of December, 1865.

The defendant does not connect itself with any title, and the rights of plaintiff are paramount and must prevail. (*Heath v. Ross, 12 Johns N. Y. 140. Lynch v. Bernal, 9 Wall, 325*).

The language of the Act granting the land to the Railroad Company (Section 3), is, "that there be and is hereby granted."

These words conveyed a present interest which ripened into a perfect equity in December, 1865, and into a perfect legal title June 27th, 1867.

This action having been commenced within five years next after the issuance of the patent to the Central Pacific Railroad Company of California, the Statute of Limitations relied on by defendant is no bar. (*Gardiner v. Miller, 47 Cal. 570. Reed v. Ybarra, 50 Cal. 465. De Miranda v. Toomey, 51 Cal. 165*).

The judgment should be reversed and judgment should be ordered for plaintiff, as to so much of the nuisance complained of as exists in Sections 29 and 33.

JOHN H. McKUNE,
Attorney for Plaintiff in Error.

Supreme Court of the United States

No 64.

OSWALD BORDER,
Plaintiff in Error,

vs.

THE NATOMA WATER AND MINING COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

By SHELLABARGER & WILSON,
Attorneys.

Thomas McGill & Co. Law Printers 1107 E Street N. W., Washington, D. C.

Supreme Court of the United States.

No. 64.

OSWALD BRODER

vs.

THE NATOMA WATER AND MINING CO.

STATEMENT OF THE CASE.

1st. This suit was brought October 19, 1871, by Oswald Broder. (See Record, p. 5.)

2d. It is alleged in the complaint that the plaintiff in error is the owner of the following described premises:

(*a*) The S. E. ¼ of sec. 29; the S. ½ of the S. W. ¼ of sec. 28; the N. W. ¼ of sec. 33; the N. ½ of the S. W. ¼ of sec. 33; the N. E. ¼ of sec. 32,—all in township 10 N., range 8 E.

(*b*) That the defendant in error, in 1868, wrongfully and unlawfully entered upon these lands and constructed a ditch across them.

(*c*) Asks that this ditch be abated as a nuisance, &c. (Record, pp. 4, 5.)

To this complaint there was an answer by defendant in error denying severally the averments thereof, and averring that defendant in error, while these were public lands, and eighteen years before the suit was brought, by license from the United States, entered thereon and constructed the ditch complained of, and has ever since continuously

held exclusive possession and ownership of the land used for the purposes of the ditch, adversely to plaintiff and all other persons, and this for supplying water for miners and others; and that this entry, possession, and ownership were taken, acquired, and held according to the local laws of California, and under the license of the United States, confirmed by the act of Congress of 26th July, 1866. The answer also relies on the statute of limitations. (Record, pp. 6, 7, 8, 9.)

Facts Found.

There were thirty-two findings of facts, (Record, pp. 9 to 13 inclusive,) the most material of which are the following:

1st. Plaintiff in error derived his title by patent from the United States *November* 1, 1867, for the N. E. ¼ of section 32.

2d. By a patent from the United States *December* 1, 1868, for the S. ½ of the S. W. ¼ of section 28 to Jacob Broder, and a deed from Jacob Broder dated October 17, 1871.

3d. By a deed from the Central Pacific Railroad Company to plaintiff, dated *October* 8, 1867, for the S. ½ of the N. W. ¼ and the N. ½ of the S. W. ¼ of section 33.

4th. By deed from the Central Pacific Railroad Company to Jacob Broder, dated January 22, 1868, for the N. W. ¼ of the S. E. ¼, the W. ½ of the N. E. ¼, and the N. ½ of the N. W. ¼ of section 33, and a deed from Jacob Broder to plaintiff in error. (Finding 1, Record, pp. 9, 10.)

5th. The Central Pacific Railroad Company acquired its right to the lands under and by virtue of the acts of 1862 and 1864, commonly known as the Pacific Railroad acts.

That company completed 40 consecutive miles of its road, from Sacramento westwardly, December, 1865. (Findings 3, 4, 5, p. 10.)

5th. The defendant in error, a corporation of California,

commenced constructing its ditch in 1851, and completed it in 1853. (Findings 7, 8, 9, Record, p. 10.)

6th. It was constructed in accordance with the customs obtaining in the mining regions of California for conveying water for mining, agricultural, and mechanical purposes, at a cost of $200,000. (Finding 13, Record, p. 11.)

7th. That defendant in error, ever since 1853, as against everybody claimed title adversely, except the United States, and since 1855 as against the United States, has had uninterrupted, absolute, peaceable, and exclusive possession of the land in controversy, during all that time running water through it; that during all that time its right to do so has been uniformly acknowledged and recognized by the local customs, laws, and decisions of the courts of California; that during fifteen years prior to the commencement of the suit the possession of the defendant in error was continued, uninterrupted, absolute, peaceable, and exclusive, and under a claim adverse to all others whomsoever, including the United States. (Findings 10, 11, 13, 15, Record, p. 11.)

There was judgment in the trial court for the defendant in error, which was affirmed by the Supreme Court of California. (50 Cal., 621; R. 17.)

Brief.

I. As to that part of the right of way of the defendant in error which is upon the N. E. ¼ of section 32 and the S. ½ of S. W. ¼ of section 28, (those named in findings 1 and 2, Record, p. 9,) being the tracts derived by the plaintiff through patents from the United States to himself and his brother, it is to be observed that, as appears by finding 21, (Record, p. 12,) the origin and initiation of the plaintiff's right to these tracts have date subsequent to the act of 26th of July, 1866, which confirmed our said easement; and hence as to our priority of right to the easement on these

tracts there can be no question, and we understand that none is made on the other side. As to these tracts, it is true that the title was in the United States, unaffected by any outstanding grant or equity in favor of any party under whom plaintiff claims, at the date of the act of 26th July, 1866; and hence it was perfectly competent for Congress to confirm to us, as Congress did, our said easement, by said act of 26th July, 1866. (Basey *et al. v.* Gallagher, 20 Wall., 670, and cases there cited; Atchison *v.* Peterson, 20 Wall., 507.)

II. It is claimed, on the other side, that our easement upon the other above-named tracts, which were granted under said acts of 1862 and 1864 to the Central Pacific Railroad Company, is cut off and destroyed by the doctrine of "relation" asserted in such cases as The M., K. and T. Railroad Co. *v.* The Kansas Pacific Railroad Co., (7 Otto, 491,) which makes the grant to the Central Pacific take effect as of the date of the act of July 1, 1862; and hence makes it take effect before our easement was confirmed by the act of 26th July, 1866. It is, in substance, claimed that since the grant to the Central Pacific of these tracts took effect in 1862, therefore Congress could not, in 1866, confirm to us our said easement upon these particular tracts.

This claim the defendant in error wholly denies, and in support of that denial states the following propositions:

(1) That the claim of one who first constructed, held, and used according to the local laws of California a waterway, and appropriated water for mining and agricultural purposes on the public domain, did so by the license, acquiescence, and encouragement of the United States. (20 Wall., 682.)

(2) That such first appropriation and use gave a good

and first right to said water and way as against all others. (20 Wall., 682, *et seq.*)

(3) That this first and valid right to such way and water, so asserted and obtained by open, notorious, and adverse use, occupation, and possession so acquired, taken, and held by the "acquiescence, assent, and encouragement" (20 Wall., 682) of the United States, and so constituting a valid and best claim as against all other claimants, is a valid claim to and in said lands within the sense and meaning of the words "*other lawful claim*," as employed in the fourth section of said act of 2d July, 1864, (13 Stats., 358,) where are excepted from the grant to said railroads all "pre-emption, homestead, swamp land, and other lawful claim."

In enforcement of the three propositions last above stated, which result in asserting that all rights of way and water rights acquired and used according to the local mining and other laws in force on the Pacific slope, and of which the owners were in notorious possession at the date of the said acts of 1862 and 1864, are "*not defeated or impaired*" (13 Stats., 358) by any grant to the said railroad companies, we rely upon the following conclusive considerations:

(1) That this court has steadily held that the government not only assented to and licensed, but also "*encouraged*," (20 Wall., 682,) the making, use, and occupation of these water-ways for development of mines and agriculture, and hence that, as against the United States, such water-ways were recognized as "*lawful claims*."

(2) That so, also, has this court steadily held that, as against all the world, such prior construction and use of these water-ways create by Federal law a valid first and best right to the way and water. (See the cases cited in

Basey *et al. v.* Gallagher, 20 Wall., 507, and in Jennison *v.* Kirk, 8 Otto, 453.)

(3) When these grants were made by the said acts of 1862 and 1864 said owners of said water-ways were in the open, notorious, and adverse possession of such easement, of which the grantees under said acts had full knowledge, the magnitude of which this court describes in these words: "The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed at vast labor and enormous expenditure of money along the sides of mountains and through cañons and ravines, to supply communities engaged in mining as well as for agriculturists and ordinary consumption;" (8 Otto, 458;) and hence there is no injustice in making these railroad grants to be subject to these vastly valuable and important easements, of which they had full notice when they took such grants. And, on the other hand, there would be the most gross and enormous injustice in the United States first "encouraging" (20 Wall., 682; 4 Otto, 763) the citizen to make these vast expenditures and then destroying them by granting them to railroad companies.

(4) This court has solemnly adjudged that a "mining claim" in mines, where the title to the land is still in the United States, is "*property* in the fullest sense of the word, and can by State laws be subjected to liens," &c. (Forbes *v.* Gracy, 4 Otto, 762.) And being thus held to be a "*claim*," and a "lawful" one, such "mining claims"—and of course and equally such water-ways and water-rights as those here involved — are adjudged by this court to be "*lawful claims*," within the sense of these words as found in the said fourth section of the act of July 2, 1864.

(5) Both the wording of the ninth section of said act of July 26, 1866, (14 Stats., 253,) where it says that "the

right of way for the construction of ditches and canals for the purposes aforesaid *is hereby acknowledged and confirmed*," (not that this is hereby *for the first time granted*,) and the express decision of this court in Jennison *v.* Kirk, 8 Otto, 453, make these titles to these rights of way begin not from the date of the act of 26th of July, 1866, but that they "hold their respective properties from the dates of their appropriation, the first in time being the first in right."

Hence, since on the 26th of July, 1866, the legal title to these lands was still in the government, and since, hence, it was perfectly competent for the government to either except our rights of way from the grant to the Central Pacific, as it did by the fourth section of the act of 1864, or to make our title to the right of way to take effect from the date of our first possession, therefore this (by the act of 26th of July, 1866) was done; and such act has bestowed upon us a perfect title to our right of way, taking effect, at latest, from the date when we completed this work,—in 1853.

(6) Because the land grants contained in the acts of 1862 and 1864 are public grants by the government, nothing will pass by them except what necessarily and by strict construction against the grant must pass; (11 Pet., 440; 13 How., 71; 16 How., 524; 23 How., 435; 24 How., 448; 1 Bl., 369; 2 Bl., 722;) and under this rule it is impossible to hold that, when the fourth section of the act of 1864 carefully provides that no "lawful claim" then held, in any of the lands granted, by other parties shall be affected by the grant, the enormous rights and interests which this court has always protected as valid, and the extent of which is indicated in the words we have quoted from 8 Otto, 458, are all to be swept away by this grant to railroads, which carefully excepts from the grant all "*lawful claims*" of all persons whomsoever.

(7) This court has carefully considered the question of

our right to acquire our alleged interests in these lands, either during the time before these acts of 1862 and 1864, or during the time intervening between the date of the grant in 1862 and 1864 and the time when these land grants ceased to be "floats"; and this court has held that "the government did not intend to withhold the lands in the meantime from the occupation" and use which we subjected them to in the interest of the mining and agricultural development of the country. (M., K. and T. Railroad Co. *v.* Kansas Pacific Railroad Co., 7 Otto, 498.) Hence there was nothing in the acts of 1862 and 1864 which rendered it incompetent for Congress in the act of 26th July, 1866, to do what it did in confirming our title to us from the date of our possession of our easement, because before the enactment of the acts of 1862 and 1864 we had acquired said rights of way under said local laws and license of the United States.

(8) Even if it were conceded that when, on the 26th July, 1866, Congress confirmed to us our title in the right of way, that the Central Pacific and its grantees had such an equity in the lands in question as that Congress could not confirm our title to us so as to destroy this outstanding equity, yet it cannot be denied that on 26th July, 1866, the government held the legal title to all the lands in dispute, and could grant to us (as it did) the legal title to our said right of way; and if we took that legal title subject to an outstanding equity in favor of the Central Pacific, still, even in that case the plaintiff cannot sustain the action he has brought, based wholly on the claim that he holds the legal title, and not suing us to get in a title which his alleged equity turns into one held in trust for plaintiff. Plaintiff can only recover on the *allegata et probata* of his case. And he presents no case for a recovery from us of a legal title which, it cannot be denied, the act of July 26, 1866, did bestow upon us for our right of way.

For the foregoing reasons, it is plainly impossible for the plaintiff to succeed in reversing the judgment of the Supreme Court of California.

For further discussion of the propositions relied on by the defendant in error, we beg leave to adopt and refer the court to the able brief of our associate, Mr. A. B. Catlin, which we file in the case.

In submitting this brief on the merits, we wish to distinctly reserve all benefit of exception to the consideration of this proceeding in error, on the ground that at this date there has been no assignment of errors by the plaintiff.

SHELLABARGER & WILSON,
Of Counsel for Defendant.

No. .....

In the Supreme Court of the United States.

OSWALD BRODER,

Plaintiff in Error,

v.

The Natoma Water and Mining Company,

Defendant in Error.

Brief, Points, etc., for Defendant in Error.

A. P. CATLIN,

Of Counsel for Defendant in Error.

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v.

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Brief, Points, etc. for Defendant in Error.

I.

PLAINTIFF'S action cannot be maintained, because all his titles had their inception subsequent to the 26th day of July, 1866, the date of the Act entitled "An Act granting the right of way to ditch and canal owners over the public lands, and for other purposes."

Plaintiff filed his declaratory statement on the 6th day of August, 1866, for the N. E. ¼ of Sec.

32, and made his proofs on the 20th of November, of same year. The patent for this ¼ section was issued to him on the 1st of November, 1867.

Jacob Broder, plaintiff's grantor, filed his declaratory statement on the 14th of September, 1866, for the S. ½ of the S. W. ¼ of Sec. 28, and made his proofs on the 12th of February, 1867. The patent for this land was issued to him on the 1st of December, 1868.

The Central Pacific Railroad Company, plaintiff's grantor, received a patent for Section 33, dated 27th June, 1867.

Vide 1st and 21st Findings.

II.

The ninth section of the Act of July 26th, 1866, provides:

"That whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by local customs, laws, and decisions of Courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowleged and confirmed."

The defendant's canal was constructed through vacant public lands as early as 1853. Its construction was commenced in 1851; and its right to

the same had been recognized and acknowledged by the local customs, laws, and decisions of Courts for fifteen years at the date of the Act above mentioned, and for a longer time at the dates when plaintiff's titles had their inception.

The canal was completed on the 25th of June, 1853, through the lands which plaintiff acquired in 1867 and 1868.

Vide 9th, 10th, 11th, 12th, and 13th Findings.

III.

The foregoing statement of the facts of the case being correct, it would seem unnecessary to cite authorities, and difficult to find any proposition for argument.

But it was contended by plaintiff in error, in the Supreme Court of California, that the title to the lands in Section 33 passed from the United States to the Central Pacific Railroad Company in December, 1865, and was therefore not subject to the effect of the Act of July 26th, 1866.

This pretense is founded upon the facts stated in the 5th finding, and upon the application of those facts to the fourth section of the Act of July 1st, 1862.

It may not be exactly correct to say that plaintiff in error contends that the title passed in December, 1865, but he does claim, by reason of the facts

found in the 5th finding, that the railroad company then acquired a "perfect equity" in the odd sections embraced within the first forty consecutive miles of its completed road, within which distance the said Section 33 is situated.

With regard to this proposition, we say that the facts found are wholly insufficient to establish any equity whatever.

The mere naked fact is stated in the 5th finding:

"That in the month of December, 1865, the said Central Pacific Railroad Company, of California, completed forty consecutive miles of its road commencing at the City of Sacramento, extending eastwardly, as shown by a copy of a plat hereto annexed, marked 'B,' and made a part hereof; which plat also shows the land described in the complaint."

It is not found that the telegraph line was built, or that the road was equipped, or was ready for service, or was otherwise provided as required by the granting Acts.

The fourth section of the Act of 1862 is as follows:

"And be it further enacted, that whenever said company shall have completed forty consecutive miles of any portion of said railroad *and telegraph line* ready for the service contemplated by this Act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad; the rails

and all the other iron used in the construction and equipment of said road to be American manufacture, of the best quality, the President of the United States shall appoint three Commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad *and telegraph line* have been completed and *equipped* in all respects, as required by this Act, then upon certificate of said Commissioners to that effect, patents shall issue *conveying the right and title* to said lands to said company on each side of the road as far as the same is completed to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said Commissioners; * * * * *provided*, however, that no such Commissioners shall be appointed by the President of the United States unless there shall be presented to him a statement verified on oath by the President of said company that such forty miles have been completed in the manner required by this Act, and setting forth with certainty the points where such forty miles begin, and where the same end, which oath shall be taken before a Judge of a Court of record."

Section 6 of the Act amendatory of the foregoing Act, passed April 2d, 1864, modifies the proviso to Section 4, above recited, so as to permit the President of the United States to appoint the Commissioners at any time, and the President of the railroad company to file the verified statement with the U. S. Surveyor General for California. Upon receiving notice of such filing, the Commissioners are required to

"Proceed to examine the portion of said railroad and telegraph line so completed, and make their report thereon to the President of the United States, as provided by the Act to which this is amendatory; and such statement may be filed and such railroad and telegraph line be examined and reported on by the said Commissioners, and the requisite amount of bonds may be issued, and the lands appertaining thereto may be *set apart, located, entered, and patented*, as provided in this Act, and the Act to which this is amendatory, upon the construction by the said Railroad Company of California of any portion of not less than *twenty* consecutive miles of their said railroad and telegraph line, upon the certificate of said Commissioners that such portion is completed as required by the Act to which this is amendatory."

All of the conditions specified in the statute are conditions precedent. There is nothing in the 5th finding, nor in any evidence contained in the record to show when any of them were performed.

It may be presumed they were all performed prior to the 27th of June, 1867, the date of the patent to the railroad company, but it cannot be presumed they were performed prior to the 26th of July, 1866, the date of the grant to the defendant.

For the purposes of the argument, it may be admitted that the railroad company was vested with a "perfect equity" when the Commissioners made and issued their certificate; and that by the issuing of such certificate the company was placed in the same position as that of a pre-emptioner who has

made proof and payment. Yet this concession does not help the plaintiff's case, for the reason, as before stated, that it does not appear that the certificate was made prior to the passage of the Act of July 26th, 1866. (The case does not show when this certificate was made, or that it was made at all, and as before stated it can only be presumed that it was made at some date prior to the 27th of June, 1867.)

It was upon this ground that the Supreme Court of California rested its decision. After referring to the 4th section of the Act of 1862, the Court concluded its opinion as follows:

"The law places in the President or Board of Commissioners, or both, the power of determining whether the railroad company has performed the conditions prerequisite to the issuing of the patents. It is manifest that until the Commissioners made their certificate, the company had no vested equity which can be recognized by the State Courts; there is no finding that such certificate was made prior to the passage of the Act of July 26th, 1866."

50 Cal. 624.

VI.

There is one other important condition precedent which the railroad company neglected to perform.

The 21st section of the amendatory Act of July 2d, 1864, is as follows:

"And be it further enacted, that before any land granted by this Act shall be conveyed to any com-

pany or party entitled thereto under this Act, there shall be first paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest, as the title shall be required by said company, which amount shall, without any further appropriation, stand to the credit of the proper account, to be used by the Commissioner of the Generel Land Office for the prosecution of the survey of the public lands along the line of said roads, and so from year to year until the whole shall be completed, as provided under the provisions of this Act."

The effect of this section was determined by this Court in **Railway Co. v. Prescott, 16 Wall. 603,** where the Kansas Pacific Railroad Company, one of the beneficiaries under the railroad grants of 1862 and 1864, had completed forty miles of road, which had been accepted by the President, but had not made the payment required by the 21st section above quoted. It was held that such payment was prerequisite, and that it and the acceptance of the forty miles of road were both necessary before the company acquired an equitable title.

VII.

The defendant's canal having been constructed under State authority in 1853, having been maintained by encouragement and permission of the Government ever since, costing $200,000, carrying 14,000 inches of water (**Findings 14 and 16**), supplying 2,000 persons who could be supplied in

no other way with water below the lands described in the complaint (**Finding 31**), acknowledged and recognized by the local customs, laws, and decisions of the State Courts (**Findings 10, 11, 13**), may it not be put to this Court as a pertinent question whether Congress did not intend to protect it and all other like claims upon the public lands in California by the fourth section of the amendatory Act of 1864, in which it is proved that "any lands granted by this Act, or the Act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, *or other lawful claim?*"

In view of the fact that it was as well known to Congress in 1864 as any other matter touching the history and condition of California, that a great part of its wealth and enterprise was invested in and dependent upon its canals constructed upon the public lands for mining and agricultural purposes under countenance at least on the part of the Government, it would be contrary to common intelligence and sound reason to suppose that the easements of these canals do not come within the fair sense and meaning of the term "lawful claims" as used in the Act.

These easements were in every sense lawful. No Act of Congress, nor any regulation of the Land Department, had ever forbidden or restricted them. There were laws and regulations for the protection

of the public lands in other respects; but with respect to these, they were regarded by the Government as beneficial to itself, and were countenanced as being great promoters of the settlement and improvement of the State.

This Court recognized the principle in **Atchison v. Peterson, 20 Wall. 512,** where it says:

"The Government by its silent acquiescence assented to the general occupation of the public lands for mining, and to encourage their free and unlimited use, for that purpose reserved such lands as were mineral from sale and the acquisition of title by settlement."

And in **Basey v. Gallagher, 20 Wall. 681,** and in **Sparrow v. Strong, 3 Wall. 104,** where it says:

"We cannot shut our eyes to the public history which informs us that under this legislation, (recognizing the rules, regulations, and customs of the mining districts,) and not only without interference by the National Government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country."

VIII.

Fully believing this Court will not find it necessary to examine the record further than upon the points above submitted, the defendant in error nevertheless deems it proper to submit here, as it did in the

Court below, its other grounds of defense, which, in case those already offered are held by the Court insufficient, are entitled to consideration, and are believed of themselves to constitute a defense to this action.

If it be true that the railroad title accrued in the form of a vested equity in December, 1865, then plaintiff's action is barred by the California Statute of Limitations, it being more than five years from that date to 19th October, 1871, the date of the commencement of the action.

The possession of the defendant was adverse to all the world, except the United States, continuously from 1853 up to the 26th day of July, 1866, and from thence to the commencement of the suit was adverse to all, including the United States. **(Vide 15th Finding.)**

The action was commenced 5 years, 2 months, and 23 days after the defendant's rights and right of way had been fully acknowledged and confirmed by the United States; and 5 years, 10 months and upwards from the time when plaintiff claims his grantor became vested with the equitable title.

Defendant's right is an easement which may be acquired by prescription. Prescription runs as well against an equitable title as a legal title. Although defendant's prescription could not run against the United States, it could against the railroad company.

IX.

Is the Defendant's Ditch a Nuisance?

The complaint states a cause of action against the defendant for a nuisance. It avers three grounds:

First—That the ditch injures the health of plaintiff and his family.

Second—That the ditch obstructs the free use of plaintiff's property, and interferes with the comfortable enjoyment of the same.

Third—That plaintiff has sustained damages thereby to amount of $12,000.

All of these averments are denied by the answer.

At the trial plaintiff waived his claim for damages. (26th Finding.)

The 28th finding is: "That said ditch and water flowing thence have not produced malaria or injured the health of plaintiff or any other person."

The 25th finding is: "That it is not difficult or impossible to cultivate or plow near the said ditch except about ten feet on the east bank and fifteen feet in width in all."

The 18th finding states that the ditch "obstructs and interrupts the free use of the farm of plaintiff," and states the manner and extent of the interruption, the ditch being "too deep and the banks too steep to be crossed by teams, and rendering it necessary to maintain bridges across the same, and rendering it difficult to plow in the *immediate* vicinity of the ditch."

The 20th finding states that plaintiff's lands "which are not occupied by the ditch and banks are augmented or increased in value by means of the location and operation of said ditch and branch thereon, and that no request or demand to discontinue or to cease, or change the operation of said canal on said premises was ever made by any person or party before the commencement of this action."

The 22d and 24th findings state that Oswald Broder and Jacob Broder have used the water of said ditch, (purchasing the same of defendant), to irrigate the lands described in the complaint, which are described as arid and dry in Summer, and having no natural water on the same, ever since 1852, "except that Jacob Broder did not so use the water in the Summer of 1873," (since the commencement of the suit), and that they "have at different times worked upon said canal and branch in repairing for defendant, and have used the same to the present time."

Under such a state of facts it seems plain that the canal is not a nuisance.

Every averment in the complaint of facts in the nature of a nuisance are negatived by the findings. If canals are *per se* nuisances because men have to build bridges over them, and cannot plow close to them, how are the mines of California to be worked, or its plains be irrigated for the successful cultivation of the cereals?

"Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." **(Cal Civil Code, Sec. 3482.)** Defendant was incorporated under a State law authorizing it to build the ditch. The Act of Congress of July 26th, 1866, is authority for building ditches, and for sixteen years before that there was an executive license from the Government for the building of ditches upon the public land. The building of a ditch upon private property is a trespass, but is not a nuisance. If it be true that a ditch is *per se* a nuisance, then it would be useless to acquire the right of way by condemnation. Whether a ditch is or is not a nuisance depends upon the manner of its maintenance, not upon the fact. That it may be so kept as to be a nuisance is not questioned. A railroad is not *per se* a nuisance because it interferes with the free enjoyment of property by those through and near whose lands it is operated, but it may become a nuisance by bad management of its trains and the use of defectively constructed engines.

Wood's Law of Nuisances, Sec. 748.

The same author says, at page 21: "In giving force and effect to the maxim '*Sic utere*,' etc., the Courts are always met by the right of parties to use their own property in every reasonable way, and neither justice nor public policy would tolerate the idea that a person should be made liable for dam-

ages resulting from a reasonable use of property; therefore, in determining whether or not an injury has been done amounting to a nuisance, it is necessary to balance the rights of the parties in view of all the circumstances, and say whether or not the use of the property in the manner complained of is reasonable and in accordance with the relative rights of the parties."

Even if the defendant's canal is constructed and held without any right or title upon lands of another, equity will not attempt to abate it as a nuisance. The remedy is ejectment to recover the possession of the land.

People v. Davidson, 30 Cal. 379.

Respectfully submitted.

A. P. CATLIN,
Of Counsel for Defendant in Error.